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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No.

THE BLACKFEET AND GROS VENTRE TRIBES OF INDIANS, Residing upon the Blackfeet and Fort Belknap Reservations in the State of Montana, *Petitioners,*

v.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners, the Blackfeet and Gros Ventre Tribes of Indians respectfully petition the Court for a writ of certiorari to the United States Court of Claims.

OPINIONS BELOW

The opinion of the court below appears in 119 F. Supp. 161, and appears in the separate appendix hereto.

The opinion of the Indian Claims Commission appears in 2 Ind. Cls. Comm. 302, and appears in the separate appendix hereto.

JURISDICTION

The date of the judgment or decree sought to be reviewed is March 2, 1954, which was entered on the same day. The court below denied a petition for rehearing on May 4, 1954. The statutory provisions believed to confer on this Court jurisdiction to review the judgment or decree in question by writ of certiorari is § 20(c) of the Indian Claims Commission Act (Act of August 13, 1946, c. 959, 60 Stat. 1049, 1054), 25 U.S.C. § 70s, quoted in the appendix, *post*, and § 1255 of the Judicial Code (28 U.S.C. § 1255).

QUESTIONS PRESENTED

1. Whether Congress, in enacting the Indian Claims Commission Act, intended the provision preserving defenses to claims filed under § 2 to bar, on the technical grounds of *res judicata*, a claim by Indian tribes for damages for delay in making compensation for lands, the principal value of which (at the time of taking) had been paid in another suit in which there had been neither presented nor determined by the court any question concerning the right to damages for delay in making compensation.

2. As a corollary to the above, whether in ascertaining the intent of Congress by reference to legislative history, a supplemental statement of the House Managers speaking directly on the question may be rejected as merely the private views of the Congressmen signing it, because it was not published in the Congressional Record until after the act had been passed.

3. Whether recovery can be had notwithstanding the defense of *res judicata* where Congress limited jurisdiction in the earlier case to claims arising directly from a treaty—thereby precluding adjudication of the instant claim for damages for delay in making compensation, which claim arose not from the treaty, as did the claim for value of the land, title to which was conferred by the treaty, but arose

from the constitutional requirement for just compensation as a result of the delay of the United States in making payment.

4. Whether the technical legal defense of *res judicata* based on an earlier action at law can be invoked to defeat "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity" under § 2(5) of the Indian Claims Commission Act, without considering the fairness or honorableness of the dealing with petitioners.

STATUTES INVOLVED

The statutes involved are as follows, pertinent portions of which are set forth in the appendix, *post*.

Indian Claims Commission Act (Act of August 13, 1946, c. 959, 60 Stat. 1049), 25 U.S.C. § 70 *et seq.*

Jurisdictional Act of March 13, 1924, c. 54, 43 Stat. 21.

STATEMENT OF THE CASE

There has been no dispute between the parties as to the facts of this case. By treaty of 1855[1] it was agreed between petitioners and the United States that a large tract of country in Montana "shall be the territory of the Blackfoot Nation". In 1924 Congress authorized suit in the Court of Claims by petitioners and certain others against the United States "for lands or hunting rights claimed to be existing in all said nations or tribes of Indians by virtue of the treaty of October 17, 1855 . . . and all claims arising directly therefrom, which lands and hunting rights are alleged to have been taken from the said Indians by the United States . . ."[2] Petitioners sued in 1925; and in 1935, the Court of Claims found (81 C. Cls. 101, 113) that after

[1] Treaty of October 17, 1855, 11 Stat. 657, between the United States and the Blackfoot Nation, Art. IV.

[2] Jurisdictional Act of March 13, 1924, c. 54, 43 Stat. 21, quoted in full in the appendix, *post*.

certain takings of their lands and additions to their lands petitioners had been "deprived of 12,261,749.76 acres, for which they have received no compensation."

The Court of Claims found the value of the lands at the time of taking to have been 50¢ an acre, or $6,130,874.88. Against this value it set off, as provided by the jurisdictional act, expenditures out of "gratuity" appropriations of $5,508,409.31, leaving a total judgment (distributed between petitioners) of $622,465.57. There was neither presented to nor determined by the court any assertion in that case that petitioners were or might be entitled to damages for the delay (from 1874 and 1880 until 1935)[3] in making compensation for the lands taken.

In 1946, Congress enacted the Indian Claims Commission Act[4] providing that the Commission should hear and determine Indian tribal claims, including "(1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President;" and "(5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity." Petitioners filed a petition claiming, among other things, damages for the delay in making compensation for the lands taken from 1874 to 1880, the principal value of which was paid pursuant to the 1935 judgment of the court below.

Upon motion for summary judgment, the Indian Claims Commission on the issue here involved[5] held that the claim

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[3] As shown by Finding XIV of the Court of Claims (81 C. Cls. at p. 113), the takings were in 1874, 1875 and 1880.

[4] Act of August 13, 1946, c. 959, 60 Stat. 1049, 25 U.S.C. § 70 et seq., quoted in material parts in the appendix, *post*.

[5] Certain other issues were sought to be foreclosed by the motion, but they were ruled in petitioners' favor and are not material to this petition. Two separate orders were entered by the Commission, the later one finding that there was no just reason for delay of the present aspect of the proceeding and that the dismissal of the petition as to it should be final immediately. An appeal was taken from each order, both of which were ruled in the one opinion of the Court of Claims and hence are covered in the one petition for certiorari here.

for damages for delay in making payment was *res judicata* by virtue of the earlier Court of Claims case. That Commission felt that the action for the value of the land and the damages for delay in making compensation (which it called "interest increment thereon"—although at no time have petitioners asserted a claim for interest as such) were inseparable, and that the Court of Claims actually had had authority and jurisdiction to grant that portion of the claim in 1935 as well as what it did grant.

The Court of Claims[6] affirmed, by a vote of three-to-one (Judge Madden dissenting). It thought it was plain that the claim upon which petitioners recovered in 1935 was for a taking of lands protected by the Constitution, and that petitioners had been entitled to damages for the delay in making compensation. It felt that the jurisdictional act had intended to accord jurisdiction for *taking* of the lands of petitioners, wherefore the court had jurisdiction to award just compensation, including the damages for delay, which was inseparable from the claim for taking the land itself.

The court below felt that since it had had jurisdiction and had decided the claim on the merits in 1935, its judgment barred every matter actually advanced and also every matter which could have been advanced. It relied on a provision of § 2 of the Indian Claims Commission Act providing that "all other defenses" than limitations or laches should be available to the United States. It felt that other matters in the legislative history interpreting that provision as not intended to preclude any claim authorized by the section "which has not been in fact previously adjudicated or settled on its merits" did not indicate the intention of Congress in this specific situation. A supplemental statement signed by the House managers, actually printed in the Congressional Record after Congress had adjourned, specifically recognizing that a claim such as the instant one

[6] Jurisdiction upon the Court of Claims to review the final decisions of the Indian Claims Commission is extended by § 20(b) of the Indian Claims Commission Act (25 U.S.C. § 70[s]).

would not be barred, was regarded by the court below as expressing only the intention of those Congressmen whose names were signed thereto.

Finally, respecting the alternative claim that petitioners are entitled to recover under the fair-and-honorable-dealings provision (clause (5) of the Act) the court below held that since the claim here sued upon was one well recognized under established legal principles, it does not come under clause (5).

The dissent points out that at the time the 1935 case was determined, there was no case in which the court below had ever awarded interest to an Indian tribe on land taken, and that under the legal doctrines prevalent at the time the lawyers representing the tribes obviously had concluded it was futile to ask for interest. The claim had not been disposed of, on the merits or otherwise, in that litigation; and Congress in passing the Indian Claims Commission Act understood that claims not so disposed of would still be open. The contrary interpretation contradicts the purpose of Congress in the act to get the claims of the Indians settled once and for all, merely putting the tribes back in the position of petitioning Congress for a redress of grievances.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

This Court has pending before it another case said to involve[7] a different subsection of § 2 of the Indian Claims

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[7] Actually that action was filed in the Court of Claims (not the Indian Claims Commission) under the provisions of § 24 (not § 2) of the Indian Claims Commission Act, 28 U.S.C. § 1505. While the jurisdiction over claims to be heard by the Indian Claims Commission is more extensive than those arising after August 13, 1946, to be filed in the Court of Claims, the jurisdiction is not different in so far as are concerned claims "arising under the Constitution, laws or treaties of the United States". The existence of many claims in the Indian Claims Commission, filed under the same jurisdictional provision (§ 2, Ind. Cls. Comm. Act) as the present, was pointed to by respondent as stamping the Tee-Hit-Ton case as of an importance deserving a grant of the writ.

Commission Act—*Tee-Hit-Ton Indians* v. *United States*, No. 43, O.T. 1954, pending on writ of certiorari to the Court of Claims. This Court's granting of the petition in that case because of its importance in the construction of the Act, logically calls for the granting of this petition, which involves the far-reaching effects of clause (5) relating to fair-and-honorable dealings, in addition to clause (1), and the important effect of the all-defenses clause of § 2 of the Act.

When Congress provided in § 2 of the Indian Claims Commission Act that all claims may be heard and determined notwithstanding any statute of limitations or laches, but that "all other defense shall be available to the United States", it did not intend to bar a claim, such as this, never before litigated or determined on the merits. It has been known for a generation that there is no solution to the "Indian problem" in this country short of taking care, on the merits, of the tribal claims of the Indians.[8] And specifically, Congress understood in passing the Indian Claims Commission Act it was making provision for determining all tribal claims on their merits.[9] Originally the House adopted an amendment to the proposed act that no claim shall be considered where a final decision previously had been made "on the merits of such issue by any court of

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[8] See Meriam and Associates, "The Problem of Indian Administration", p. 805 (1928), and references in hearings before the Sen. Comm. Ind. Affairs on S. 2731, 74th Cong., 1st Sess. (1935) to the testimony of Commissioner Merritt at hearings before the subcommittee of the House Comm. Ind. Affairs on the appropriation bill for 1914, p. 99; and see pp. 8 and 83 of the same 1935 hearings.

[9] In the bill, H.R. 4497, 79th Cong., 1st Sess., which became the Indian Claims Commission Act, it was repeatedly recognized, as was said by the Chairman of the House Committee (Mr. Jackson) himself in the debate May 20, 1946, Cong. Rec. p. 5314, "I think, frankly, this bill goes to the real heart of this problem. If you are ever going to settle this Indian question in the United States, you have to settle these claims." See also *id.*, p. 5312. See H. Report No. 1466, 79th Cong., 1st Sess., on H.R. 4497, p. 10, which was adopted by the Senate Committee, S. Rep. No. 1715, 79th Cong., 1st Sess., pp. 2-3.

the United States in a proceeding with respect to such claim." (Cong. Rec. May 20, 1946, p. 5322.) When the Attorney General proposed to substitute the language finally adopted respecting "all other defenses", his representative thrice denied that this language changed the meaning of the bill as it had passed the House.[10] These representations as to the meaning of the "all other defenses" clause were accepted at face value, for in concurring in the Senate amendment which brought that clause into its present form, the House Managers reported that the amendment was not intended to preclude the adjudication of a claim "which has not been in fact previously adjudicated or settled on its merits." H. Rep. No. 2693, 79th Congr., p. 6. This conference report and the statement of the House Managers was before both Houses of Congress when the report of the conferees was adopted and the bill passed.

Subsequently the House Managers, including the Chairman of the House Committee, filed a supplemental statement intended to confirm explanations which had been previously given to their colleagues on the meaning of the "all other defenses" amendment,[11] but which had not been incorporated in the Conference Report because of a rush to meet a deadline.[12] This statement dealt directly with the question at issue:

> "Neither does it [the "all other defenses" amendment] mean that causes of action which could have been

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[10] Hearings before the Sen. Comm. Indian Affairs on H.R. 4497, 79th Cong., 2d Sess., June 1, 1949, pp. 16, 21, 58-9.

[11] The supplemental statement was made "In view of the requests that have been made by our colleagues for an authoritative statement as to the effect of the Senate amendment and as to other parts of the conference report, . . . in confirmation of informal explanations already made to our colleagues . . ." Cong. Rec. Aug. 12, 1946, p. A4923.

[12] The supplemental statement was forecast when the Conference Report, *supra*, was read on the floor of the House: "We may file a supplementary conference statement later as we were pressed for time to meet Saturday night's deadline, . . ." Cong. Rec. July 29, 1946.

> brought under prior jurisdictional acts, but which were not, can be defeated. Only cases which have been actually tried before the courts and settled on their merits under both the jurisdictional features of the particular jurisdictional act and the jurisdictional language of this act are precluded from determination by the Commission. Thus, where an Indian tribe has already recovered for the value of land taken from it, the Commission will not be permitted to reopen the case as to the principal value of that land, but the Commission will be permitted to entertain a claim for just compensation where no such claim was actually litigated by the Tribe." Cong. Rec., Aug. 12, 1946, p. A4923-4.

The Court below ignored respondent's efforts to discredit this leglislative history on grounds that counsel for the Indians had participated in drafting the supplemental statement, but nevertheless disposed of the supplemental statement as representing "only the intention of those Congressmen whose signature appear thereon." In failing to recognize this legislative history as an authoritative declaration of the interpretative comments of those legislators charged with supervision over this legislation, the Court below reached a result in conflict with the principles established by this Court in *Duplex Co.* v. *Deering,* 254 U.S. 443, 474, and *Wright* v. *Vinton Branch,* 300 U.S. 440, 463.

In terms of the act as a whole, the broad jurisdiction accorded, the obvious purpose to hear and determine all claims as a matter of moral as well as legal right, it is apparent that no broad meaning can be attributed to the "all defenses" provision which would, for instance, permit the raising of a defense that there is no legal or equitable claim, where Congress has just said, in the same section (§ 2[5]) that the Commission shall hear certain claims "that are not recognized by any existing rule of law or equity". Manifestly, to the extent that Congress contemplated a plea of *res judicata* it considered only those

cases in which the tribes had had their cases disposed of *on the merits* of those claims.

And on the merits of this claim there can be no ground of dispute. The United States and petitioners had agreed upon the lands petitioners were to have exclusively. Notwithstanding that agreement, the United States took a portion of that land from 1874 to 1880. It delayed making payment of any kind until 1935, having the use both of the land and of the money due for it, to the manifest damage of petitioners.[13] And the just compensation due pursuant to the Fifth Amendment includes damages for that delay,[14] even in the case of lands taken from an Indian tribe.[15] Petitioner has not received those damages for delay, but only the value of the lands when taken. The wrong to petitioner, its damage, and the fact that it has never received compensation for that damage and that its contention in that regard has never actually been presented or actually considered, are all plain.

There are two other grounds, one narrower and one broader, on which petitioner equally should have been held entitled in this proceeding to recover:

The narrower ground we do not separately rely on as justifying certiorari, since the facts are peculiar to this case; but it should be before the Court on the merits in the event the writ is granted. It is: Petitioner's right to the land which was taken itself is founded on the Treaty of 1855—in terms of the earlier (1924) jurisdictional act,

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[13] 25 U.S.C. § 158, R.S. § 2096, provides for interest at 5% upon the proceeds of Indian lands.

[14] Seaboard Air Line Ry. Co. *v.* United States, 261 U.S. 299, 306; Brooks-Scanlon Corp. *v.* United States, 265 U.S. 106, 123; Phelps *v.* United States, 274 U.S. 341, 344; Jacobs *v.* United States, 290 U.S. 13, 16-17.

[15] United States *v.* Creek Nation, 295 U.S. 103, 111; Shoshone Tribe of Indians *v.* United States, 299 U.S. 476, 496-497; United States *v.* Klamath &c. Tribes, 304 U.S. 119, 123. This is not true of course, where the taking is a tortious one, Goltra *v.* United States, 312 U.S. 203, 207; United States *v.* Alcea Band of Tillamooks, 341 U.S. 48—a problem not inherent in the present case.

it is a claim existing in petitioners "by virtue of the treaty of October 17, 1855" with petitioners "and all claims arising directly therefrom." But the claim for damages for delay in making compensation arises not from that treaty, but from the act of Congress authorizing taking of the lands plus actual takings, combined with the delay in making payment. When Congress authorized suit for the claim arising directly from the treaty, it did not authorize suit for a claim arising from the delay which in turn is founded not on the treaty but on the Constitutional requirement of just compensation. Thus, Congress itself "split the causes of action"; it authorized suit only for the principal value of the land itself and not for the delay in making compensation. It follows that until the enactment of the Indian Claims Commission Act, Congress had not accorded jurisdiction on this claim. Manifestly the claim could not have been foreclosed by the judgment of the court if the court had no jurisdiction to consider the claim.

The broader ground of recovery: Clause (5) of § 2 of the Indian Claims Commission Act accords jurisdiction to hear claims on behalf of any tribe "based upon fair and honorable dealings that are not recognized by any existing rule of law or equity."[16] Petitioners sought recovery alternatively on this ground. This is, of course, not the same claim—hence does not require the proof of the same or similar facts nor need it yield the identical recovery—as in the case of a claim arising under the Constitution. The claim under clause (5) takes into consideration the entire course of dealings between the United States and

[16] Thus far in the administration of the Act, there has been only one trifling recovery under this provision. At the present rate, the plain purpose of Congress to have the dealings of the United States with the Indians finally disposed of on the basis of what was fair and what was honorable will pass into history as another painful example of a purpose to deal with the Indians on the basis of high principle which has been utterly frustrated in its administration.

petitioners. The measure of damages is the amount necessary to satisfy the conscience of the nation and do what is "fair" and what is "honorable".[17] The only valid defense Congress could have intended to a claim under clause (5) is that the plaintiffs were dealt with fairly and honorably. If petitioners have no claim under clause (5), it must be because they have been dealt with fairly and honorably—not because the interposition of a technical legal defense has prevented them from otherwise establishing a claim cognizable at law or equity. Both the court below and the commission which it reviewed have thus far refused to determine whether petitioners have been treated fairly and honorably.

The court below is the only court reviewing the Indian Claims Commission, save for the supervisory certiorari jurisdiction of this Court. The existence of genuine conflicts between it and a circuit court of appeals is not, therefore to be anticipated. But confusion, if not conflict, in the decisions of that court as to this very clause (5) of § 2 is evident. In the case of the *Osage Nation* v. *United States*, 119 C. Cls. 592, 670, the court below held that even though plaintiff were unable to make full proof of a legal claim for, say, fraud, still it would be entitled to have the claim measured by the yardstick of fair and honorable dealings. The court said—

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[17] What this might amount to is a matter which in the first instance would have to be left to the Commission below; for there would have to be taken into account not only that the United States had the use of more than twelve million acres of land for more than 80 years without paying anything for that privilege, but there would also have to be taken into account that the Indians did not ask for damages for the delay in 1935 (which ultimately they might have received even though nearly a year after petitioners' case had been decided the court below was holding that there could be no recovery by Indians of "interest" without specific provision therefor, Shoshone Tribe *v.* United States, 82 C. Cls. 23), which might count something against them even though the "wards" of the government were not held to the same diligence in the assertion and protection of their rights as is demanded of non-Indian citizens in their dealings with the government.

> "We believe it [clause (5)] means that if, at the outset, a claim is not cognizable, or if at the trial it is not proved and, therefore, decided favorably to petitioner under rules of law and equity, then petitioner is entitled to have it considered under the fair and honorable dealings clause."

Not so in this case. Here we are unable, because of the legal defense of *res judicata,* to prove a legal claim upon which the court below will grant recovery. But the very fact that it is asserted as a legal claim here is held to defeat recovery; says the court (separate appendix, p. 11 of the pamphlet opinion):

> "Appellants' claim in this case was one well recognized under established legal principles, and, hence, does not come within clause (5)."

This confusion (or conflict) in the decisions on this act by the court below is further indication of the necessity for this Court taking this case equally with the *Tee-Hit-Ton* case, No. 43 on the present docket, already granted—and on the same grounds.

Respectfully submitted,

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APPENDIX

Indian Claims Commission Act (Act of August 13, 1946, 60 Stat. 1049, c. 959, 25 U.S.C. § 70 et seq.)

• • • That there is hereby created and established an Indian Claims Commission, hereafter referred to as the Commission.

JURISDICTION

SEC. 2. The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after the date of the approval of this Act shall be considered by the Commission.

All claims hereunder may be heard and determined by the Commission notwithstanding any statute of limitations or laches, but all other defenses shall be available to the United States.

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REVIEW BY COURT OF CLAIMS

SEC. 20

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(b) When the final determination of the Commission has been filed with the clerk of said Commission the clerk shall give notive of the filing of such determination to the

parties to the proceeding in manner and form as directed by the Commission. At any time within three months from the date of the filing of the determination of the Commission with the clerk either party may appeal from the determination of the Commission to the Court of Claims, which Court shall have exclusive jurisdiction to affirm, modify, or set aside such final determination. On said appeal the Court shall determine whether the findings of fact of the Commission are supported by substantial evidence, in which event they shall be conclusive, and also whether the conclusions of law, including any conclusions respecting "fair and honorable dealings", where applicable, stated by the Commission as a basis for its final determination, are valid and supported by the Commission's findings of fact. In making the foregoing determinations, the Court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. The Court may at any time remand the cause to the Commission for such further proceedings as it may direct, not inconsistent with the foregoing provisions of this section. The Court shall promulgate such rules of practice as it may find necessary to carry out the foregoing provisions of this section.

(c) Determinations of questions of law by the Court of Claims under this section shall be subject to review by the Supreme Court of the United States in the manner prescribed by section 3 of the Act of February 13, 1925 (43 Stat. 939; 28 U. S. C., sec. 288), as amended.

* * *

FUTURE INDIAN CLAIMS

SEC. 24. The jurisdiction of the Court of Claims is hereby extended to any claim against the United States accruing after the date of the approval of this Act in favor of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws, treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band or group. In any suit brought under the jurisdiction conferred by this section the claimant shall be entitled to recover in the same manner, to the same extent, and subject to the same

conditions and limitations, and the United States shall be entitled to the same defenses, both at law and in equity, and to the same offsets, counterclaims, and demands as in cases brought in the Court of Claims under section 145 of the Judicial Code (36 Stat. 1136; 28 U. S. C., sec. 250), as amended: *Provided however,* That nothing contained in this section shall be construed as altering the fiduciary or other relations between the United States and the several Indian tribes, bands, or groups.

* * *

Jurisdictional Act of March 13, 1924, c. 54, 43 Stat. 21

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction is hereby conferred upon the Court of Claims, with right of appeal to the Supreme Court of the United States, to consider and determine all legal and equitable claims against the United States of the Blackfeet, Blood, Piegan, and Gros Ventre Nations or Tribes of Indians, residing upon the Blackfeet and Fort Belknap Indian Reservations, in the State of Montana; and the Flathead, Kootenais, and Upper Pend d'Oreilles Nations or Tribes of Indians, residing upon the Flathead Indian Reservation, in the State of Montana; and the Nez Perce Nation or Tribe of Indians, residing upon the Lapwai Indian Reservation, in the State of Idaho; and upon the Colville Indian Reservation, in the State of Washington, for lands or hunting rights claimed to be existing in all said nations or tribes of Indians by virtue of the treaty of October 17, 1855 (Eleventh Statutes at Large, page 657, and the following), and in said Flathead, Kootenais, and Upper Pend d'Oreilles Nations or Tribes of Indians by virtue of the treaty of July 16, 1855 (Twelfth Statutes at Large, page 975, and the following), with said Indians, and all claims arising directly therefrom, which lands and hunting rights are alleged to have been taken from the said Indians by the United States, and also any legal or equitable defenses, set-offs, or counterclaim including gratuities, which the United States may have against the said nations or tribes, and to enter judgment thereon, all claims and defenses to be considered without regard to lapse of time; and the final judgment and satisfaction thereof shall be in full settlement of all said claims.

That suits under this Act shall be begun by the filing of a petition within two years of the date of the approval of this Act, to be verified by the attorney or attorneys selected by the claimant Indians, with the approval of the Secretary of the Interior, employed under contracts executed and approved in accordance with existing law. The claimant Indians shall be parties plaintiff and the United States shall be party defendant, and such suits shall on motion of either party be advanced on the docket of the Court of Claims and of the Supreme Court of the United States. The compensation to be paid the attorneys for the claimant Indians shall be determined by the Court of Claims in accordance with terms of the said approved contracts and shall be paid out of any sum or sums found and adjudged to be due said Indians: But in no event shall said compensation exceed 10 per centum of the amount of the respective judgments, nor exceed $25,000 for the Indians residing on each respective reservation: *Provided, however,* That said compensation shall not exceed $25,000 for the Nez Perce Nation or Tribe of Indians residing on both the Lapwai and Colville Indian Reservations, nor exceed 10 per centum of the amount of any judgments rendered in favor of said Nez Perce Nation or Tribe, said compensation to be exclusive of all actual and necessary expenses in prosecuting said suits. The balance of any judgments shall be placed in the Treasury of the United States to the credit of the Indians entitled thereto and draw interest at the rate of 4 per centum per annum.

Approved, March 13, 1924.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 255

THE BLACKFEET AND GROS VENTRE TRIBES OF INDIANS, Residing upon the Blackfeet and Fort Belknap Reservations in the State of Montana, PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITON

OPINIONS BELOW

The opinion of the Court of Claims is reported in 119 F.Supp. 161, and appears in the separate appendix to the petition. The opinion of the Indian Claims Commission, reported in 2 Ind. Cls. Comm. 302, is also in the separate appendix to the petition.

JURISDICTION

The judgment of the court below was entered on March 2, 1954. A petition for rehearing was de-

nied on May 4, 1954. The petition for a writ of certiorari was filed on August 2, 1954. The jurisdiction of this Court is invoked under section 20(c) of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 1054, 25 U.S.C. 70s, and 28 U.S.C. 1255.

QUESTIONS PRESENTED

1. Whether a previous decision and judgment of the Court of Claims fixing and awarding to petitioners just compensation for the taking of land is *res judicata* of a claim for additional compensation (interest on the value of the lands from the dates of taking) filed under the Indian Claims Commission Act.

2. Whether a legal claim which has previously been finally adjudicated can be re-litigated under section 2, clause (5), of the Indian Claims Commission Act providing for claims based upon "fair and honorable" dealings.

STATUTES INVOLVED

Section 2 of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 25 U.S.C. 70a, and the Jurisdictional Act of March 13, 1924, 43 Stat. 21, are set out in the appendix to the petition.

STATEMENT

Petitioners correctly state that there is no dispute as to the facts of this case. By the Act of March 13, 1924, 43 Stat. 21, Congress authorized suit in the Court of Claims against the United States by petitioners and certain other tribes "for lands or hunting rights claimed to be existing in

all said nations or tribes of Indians by virtue of the treaty of October 17, 1855 * * * and all claims arising directly therefrom, which lands and hunting rights are alleged to have been taken from the said Indians by the United States." Petitioners sued in 1925, and in 1935 the Court of Claims found (Fdg. XIV, 81 C. Cls. 101, 113), that by Acts of Congress and Executive orders in 1874, 1875, and 1880 the United States had taken lands of the petitioners and other tribal plaintiffs, that the Indians "were deprived of 12,261,749.76 acres, for which they have received no compensation," and that the value of the lands so taken, as of the date of the takings, was $6,130,874.88. This amount was reduced by allowance of set-offs as provided by the jurisdictional act, with a resultant judgment for $622,465.57. Upon payment, this sum was distributed among the plaintiffs, including the petitioners here. No claim was advanced by the plaintiffs in that case for an allowance of interest from the dates of taking to the date of judgment as an element of just compensation, and none was included in the judgment there entered.

On August 9, 1951, petitioners sued the United States under section 2 of the Indian Claims Commission Act, advancing several claims. The only claim relevant here is one seeking interest, for the taking of the land referred to above, from the dates of taking to the date of payment. Petitioners (Petition before the Indian Claims Commission, paragraphs 7 to 10) recited the judgment in the prior case, alleged they were entitled under the Fifth

Amendment to the value of the lands as of the dates of taking, plus interest from those dates until payment, and sought judgment for the interest.

The Government filed a motion for summary judgment on the ground that the issue now sought to be litigated was or could have been tried and determined in the earlier proceeding, and that by reason of the earlier judgment that matter is *res judicata*. The Indian Claims Commission granted the motion as to the claim for interest and, on appeal, the Court of Claims affirmed the judgment of the Commission, one judge dissenting.

ARGUMENT

1. The provision of the Indian Claims Commission Act (Section 2, Pet. App. 14) waiving the statute of limitations and laches but providing that "all other defenses shall be available to the United States" makes it clear that the Act was not intended to permit re-litigation of claims of Indian Tribes which had formerly been determined, and hence that the defense of *res judicata* was fully preserved.

As the Court of Claims points out (Pet. Sep. App. 7), it is the settled rule that a prior judgment on the merits is an absolute bar to further litigation on the same cause of action, not only as to matters expressly litigated, but also as to issues which could have been litigated. And it is incontestable that the claim now sought to be prosecuted could have been litigated in the prior proceeding and was plainly a part of petitioners' cause of action in the earlier case. The special jurisdictional act under which that action was brought

clearly authorized the award of just compensation for the taking. See opinion of Court of Claims and especially H. Rep. No. 64, 68th Cong., 1st sess., quoted therein (Pet. Sep. App. 3-7). And, as the court below pointed out (Pet. Sep. App. 4), it has long been settled that, where the taking precedes payment, just compensation under the Fifth Amendment includes, in addition to the value of the lands at the time of taking, an element to compensate for delay in payment, and that a reasonable rate of interest is a valid method of ascertaining the additional amount.

Many years prior to the entry of judgment in favor of petitioners, this Court had established that Indian tribes enjoy the protection of the Fifth Amendment. *Yankton Sioux Tribe* v. *United States,* 272 U. S. 351, 359, in which it was held that where the Government had taken lands of the Tribe "they are entitled to just compensation as for a taking under the power of eminent domain." And the Court of Claims, on remand of that case, made an award for the value of the lands, plus interest from the date of taking, 65 C. Cls. 427, 429. It is thus clear that the court below had jurisdiction in the prior suit to allow the interest now sued for.[1]

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[1] Petitioners' contention (Pet. 10-11) that the present claim was not one within the scope of the special jurisdictional act is fully dealt with in the opinions below (Pet. Sep. App. 25-26, Commission opinion; 5, Court of Claims opinion). Petitioners do not rely on this contention as a ground for certiorari. The argument that a consent to suit for the taking of lands does not include consent to the award of interest as an element of just compensation was flatly rejected by this Court in *Shoshone Tribe* v. *United States,* 299 U. S. 476, 497.

Hence, since petitioners could have litigated the present demand in that proceeding, the earlier judgment renders the present claim *res judicata.*

Petitioners (Pet. 6-10) base their case primarily on the assertion that the legislative history of the Indian Claims Commission Act requires that the defense of *res judicata* be barred to the Government as to claims which could have been litigated in prior suits but which were not. Since the statute is clear and unambiguous, only the most compelling legislative history could warrant a contrary reading. Cf. *Helvering* v. *City Bank Co.,* 296 U. S. 85, 89. However, the Court of Claims, discussing the matter in considerable detail, concluded (Pet. Sep. App. 10) that "The legislative history of the Act does not persuade us that the intention of Congress was different from that indicated by the language of the Act." In brief, as the Act was passed by the House of Representatives it contained an ambiguous provision relating to defenses which might have reached the result petitioners seek here. To clarify this matter so as to make clear that the defense of *res judicata* was unimpaired, the Department of Justice requested the Senate Committee to substitute the language now appearing in the Act for the House provision. The Senate amended the bill accordingly and the House conferees accepted the amendment. As the Court of Claims observed (Pet. Sep. App. 9), the statement of the House managers does not indicate a Congressional

intention different from the plain meaning of the Act.[2] And the court was obviously correct in holding (Pet. Sep. App. 10) that the supplemental statement of the House managers filed many days after approval of the bill, and even after Congress had adjourned, cannot be taken as an authoritative expression of the will of Congress. Cf. *Fogarty* v. *United States,* 340 U. S. 8, 13-14; *United States* v. *Mine Workers,* 330 U. S. 258, 281-282.[3]

2. A challenge is raised to the ruling of the Indian Claims Commission and of the Court of Claims that a legal, as distinct from a moral, claim which had been once adjudicated on its merits may not be re-litigated under clause 5 of the Act, providing for suits upon claims based on "fair and honorable dealings." But petitioners (Pet. 11-12) discuss clause 5 in a vacuum, without reference to the other provisions of section 2. In that section (Pet. App. 14), Congress listed four classes of cases in which it consented that the United States might be sued. All four are categories where the claims of the Indians are bottomed on grounds well recognized in law or equity as the basis of judicial relief, and

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[2] Contrary to petitioners' assertion (Pet. 8), this statement was not read to the Senate and was not printed in the *Congressional Record* until after the Senate had adopted the conference report. 92 Cong. Rec., pt. 8, pp. 10,263-10,264, 10,401-10,403.

[3] Since the legislative history was considered by the court below, petitioners' assertion of failure to consider legislative history (Pet. 9) is plainly without merit.

petitioners' claim is embraced in clauses 1 and 4.[4] Congress then added a fifth category—"claims based upon fair and honorable dealings *that are not recognized by any existing rule of law or equity*" (emphasis added). Clearly, the aim of clause 5 of section 2 was to provide for a new class of cases hitherto unknown to law or equity, and of course distinct from the classes of cases listed in clauses 1 through 4, or, as the court below put it, "moral claims."[5]

If clause 5 meant, as petitioners contend, that cases falling into the first four classes, *i.e.*, claims recognized by law or equity, could be litigated on

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[4] * * * (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive order of the President; * * * (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; * * *.

[5] The House Committee on Indian Affairs, reporting the bill creating the Indian Claims Commission (H. Rep. No. 1466, 79th Cong., 1st Sess., p. 12), explained the "fair and honorable dealings" clause by referring to past instances in which claims "not strictly legal, but meritorious in character have developed, which the Congress has recognized in a few special jurisdictional acts." The example cited was the Tlingit and Haida Claims Act of 1935, 49 Stat. 388, which detailed particular instances in which the Indians may have been deprived of interests, neither legal nor equitable in origin, for which they should, in justice, be paid. The Congress undoubtedly also had in mind the cases in which the court below and this Court had denied relief, under special jurisdictional acts, because the Indian claim was not legal or equitable, but only moral. See, e.g., *Blackfeather* v. *United States*, 190 U. S. 368, 373; *Sac and Fox Indians* v. *United States*, 220 U. S. 481, 489; *Sioux Tribe* v. *United States*, 97 C. Cls. 613, 670; cf. *Sioux Tribe* v. *United States*, 316 U.S. 317, 331.

the basis of "fair and honorable dealings," then the first four clauses of section 2 would be surplusage because all claims previously adjudicated could be phrased in the language of clause 5. But, as the court below stated in *Western Cherokee Indians, et al.* v. *United States,* 116 C. Cls. 665, 677-678, certiorari denied, 340 U. S. 904, "Clause (5) obviously has reference to the fundamental character of the claim rather than to the theory on which an Indian tribe or band may seek to invoke the jurisdiction of the Indian Claims Commission." And unquestionably the fundamental character of the claim of petitioners in the present suit is a legal claim under the Fifth Amendment falling expressly under clauses 1 and 4 of section 2. Petitioners' argument on this point is merely an indirect attempt to defeat the defense of *res judicata* which, as we have shown, was preserved to the United States.

3. Petitioners' suggestion (Pet. 12) of confusion in the decisions of the Court of Claims is without basis, so far as petitioners' claim is concerned, since the court has consistently held that clause 5 may not be invoked to defeat the defense of *res judicata.* See *Western Cherokee Indians, et al.* v. *United States,* 116 C. Cls. 665, certiorari denied, 340 U. S. 904. There is likewise no merit to petitioners' suggestion (Pet. 6-7) that the granting of the petition for certiorari in *Tee-Hit-Ton Indians* v. *United States,* No. 43, this Term, supports granting certiorari in this case. As petitioners concede (Pet. 6, fn. 7), that is a case arising in the Court of Claims under the different provisions of section

24 of the Indian Claims Commission Act, and section 2 of the Act is not involved there. Neither is there any question of *res judicata* raised in the *Tee-Hit-Ton* case. Above all, the important question of the compensability of Indian or occupancy title there presented is in no wise involved in the instant suit.

CONCLUSION

The questions were correctly decided below and do not call for further review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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AUGUST, 1954.

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